A **FORMIS NETWORK SERVICES SDN BHD**

v.

JOHNSON CONTROLS (M) SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[ORIGINATING SUMMONS NO: D1-24-81-2007]
23 MARCH 2009

C ***CIVIL PROCEDURE:*** *Injunction - Application for - Restraining defendant from presenting winding up petition - Whether filing of petition an abuse of process - Failure to make full and frank disclosure - Whether plaintiff's application must fail - Companies Act 1965, s. 218*

D ***COMPANY LAW:*** *Winding up - Petition - Application for injunction to restrain defendant from presenting winding up petition - Whether filing of petition an abuse of process - Failure to make full and frank disclosure - Whether plaintiff's application must fail - Companies Act 1965, s. 218*

E This was an application by the plaintiff for an injunction to restrain the defendant from proceeding to present a winding up petition against the plaintiff pursuant to s. 218 of the Companies Act 1965. The s. 218 notice had already been served by the defendant on the plaintiff on 7 March 2007. This notice was based on an alleged unpaid debt. The plaintiff's main contention F was that it had a cross claim against the defendant due to alleged defective/incomplete works. The question that arose herein was whether the filing of a winding up petition was an abuse of process.

G **Held (dismissing plaintiff's application):**

(1) This court must respect and protect the defendant's rights to file the winding up petition - a right conferred by statute, namely, s. 218 of the Companies Act 1965 - if the defendant H honestly believed that they had the right to do so, so long as the exercise of such a right was not an abuse of process. On the evidence and the facts, the plaintiff had failed to satisfy this court that the intended petition, if proceeded with by the defendant, would constitute an abuse of process. (paras 3 & 7)

I **(2)** The defendant was not alleging the existence of a debt owing by the plaintiff to the defendant frivolously. The parties were no strangers to one another. There had been a serious

on-going contractual relationship between them. The plaintiff had appointed the defendant as a subcontractor in a building project in Putrajaya. On the facts and evidence, which were substantially undisputed, it could not be fairly said that the defendant by serving a s. 218 notice with the possibility of thereafter filing a winding up petition against the plaintiff was abusing the legal process. (paras 9 & 13)

(3) The plaintiff in the present application had also failed to disclose to the court certain material facts. Since the plaintiff was alleging incomplete/defective works, it was significant that the plaintiff had failed to inform the court about a retention sum of RM347,650 that they were withholding. There was a failure to make a full and frank disclosure. Hence, the plaintiff's present application must fail. (para 14)

Case(s) referred to:
Bryanston Finance Ltd v. De Vries (No. 2) [1976] 1 All ER 25 ***(refd)***
Malayan Banking Bhd v. Red Box (M) Sdn Bhd [2000] 6 CLJ 21 HC ***(refd)***
Rinol Malaysia Sdn Bhd v. MFRP Marketing Sdn Bhd [2003] 4 CLJ 142 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218

Other source(s) referred to:
Derek French, *Applications to Wind up Companies*, p 77

For the plaintiff - BH Yap; M/s Mah-Kamariyah & Philip Koh
For the defendant - MK Chen; M/s MK Chen & Leong

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Yunus J:

[1] This originating summons is an application by the plaintiff for an injunction to restrain the defendant from proceeding to present a winding up petition against the plaintiff pursuant to s. 218 of the Companies Act 1965.

[2] The s. 218 notice had already been served by the defendant on the plaintiff on 7 March 2007. This notice is based on an alleged unpaid debt of RM239,357.71 (based on claim under Progress Payment No. 20) plus an alleged unpaid debt of RM130,088.32 (based on claim under Progress Payment No. 24); and from these sums, minus a sum of RM179,439.85, being the amount already paid by the plaintiff to the defendant. If not restrained by this court, the next step that might be taken by the defendant, would be the presentation of a winding up petition in the winding up court. And this is what the plaintiff wants to prevent happening.

[3] I have dismissed the action with costs. In my view it is the principle that this court must respect and protect the defendant's right to file the winding up petition - a right conferred by statute, namely, s. 218 of the Companies Act 1965 - if the defendant honestly believes that they have the right to do so, so long as the exercise of such a right is not an abuse of process. This basic principle was laid down in *Bryanston Finance Ltd v. De Vries (No. 2)* [1976] 1 All ER 25, a decision of the English Court of Appeal, wherein Buckley LJ said:

> It has long been recognised that the jurisdiction of the court to stay an action *in limine* as an abuse of process is a jurisdiction to be exercised with great circumspection and exactly the same consideration must apply to a *quia timet* injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would be petitioner should not be restrained from exercising it except on clear and pursuasive grounds.

[4] But this does not mean that a would-be petitoner can never at all be restrained by the court from presenting a winding up petition: he can be and ought to be restrained where the circumstances are such that he ought to be so restrained in the interest of justice. In *Bryanston Finance* Buckley LJ explains the guiding principle in the following manner:

> In his speech in the *American Cyanamid* case [1975] AC 396 Lord Diplock recognised that there might be special factors to be taken into consideration in the particular circumstances of individual cases. In my judgment, the fact that the second action is an action designed to prevent the commencement of proceedings *in limine* is such a special factor. In such a case the court should

> not, in my judgment, interfere with what would otherwise be a legitimate approach to the seat of justice unless the evidence is sufficient to establish *prima facie* that the plaintiffs will succeed in establishing that the proceedings sought to be restrained would constitute an abuse of process. In the present case, in my opinion, this has not been achieved. I would consequently allow the appeal in the second action and discharge the injunction of May 15, 1975.

[5] In short, the above judgment enunciated the 'abuse of process' principle. But it is pertinent to note from the above passages that the party who alleges that there is an abuse of process (and in the context of the present case, it is the plaintiff) must satisfy this court with:

> ... clear and pursuasive grounds.

[6] The principles in *Bryanston Finance* have been followed by our courts, for example, in *Malayan Banking Bhd v. Red Box (M) Sdn Bhd* [2000] 6 CLJ 21 and *Rinol Malaysia Sdn Bhd v. MFRP Marketing Sdn Bhd* [2003] 4 CLJ 142.

[7] Thus, in the case now that is before me, the question arises: would the filing of a winding up petition by the defendant (in the light of the service of the s. 218 notice on the plaintiff) be an abuse of process? In my judgment, on the evidence and the facts, the plaintiff (the party who bears the burden of proving) had failed to satisfy this court that the intended petition, if proceeded with by the defendant, would constitute an abuse of process.

[8] At this juncture may I pause for a moment to remark that, although *Bryanston Finance* concerned an interlocutory injunction, whereas the present case before me concerns a permanent injunction, nevertheless, in my view, the principle ought to be the same. In *Applications to Wind up Companies* by Derek French, the learned author says (at p. 77):

> Applications to prevent a petition proceeding invoke the inherent jurisdiction of a court to prevent an abuse of its process (*Charles Forte Investments Ltd v. Amanda* [1964] Ch 240 per Willmer LJ at p. 250 and Danckwerts LJ at p. 259; B*ryanston Finance Ltd v. De Vries (No. 2)* [1976] Ch 63 per Buckley, LJ at p. 76 and Stephenson LJ at p. 79).

[9] In the case now before me, I do not find the facts of the case as pointing to any abuse of process by the defendant. Indeed, I do not think that it can be fairly said that, *prima facie*,

the defendant has no basis at all in serving the s. 218 notice on the plaintiff. The defendant is not alleging the existence of a debt owing by the plaintiff to the defendant frivolously. The parties are no strangers to one another. There had been a serious on-going contractual relationship between them. The plaintiff had appointed the defendant as a subcontractor in a building project in Putrajaya. Under the subcontract the defendant was to supply goods and services and to install intelligent control systems known as:

(a) Security Access Control System ('SACS'); and

(b) IP CCTV System ('CCTV').

[10] During the course of the project, the defendant had submitted monthly progress claims to the plaintiff for payment of works carried out. The plaintiff responded to the same by issuing interim certificates, entitled 'letter of acceptance', which contain the plaintiffs valuation of the work carried out by the defendant. Each letter of acceptance covered the work executed up to a particular date, as stated in the same. Upon receipt of a letter of acceptance, the defendant would issue an invoice to the plaintiff based on the letter of acceptance. Thereafter, the plaintiff would pay the defendant based on the letter of acceptance and the invoice.

[11] One of the certificates was the Letter of Acceptance No. 9 ('LOA 9'), which was in response to the defendant's progress claims No. 20 for CCTV and No. 23 for SACS. LOA 9 was for the 'period ending: 25 August 2005', that is, it covered the defendant's works up to that date. According to LOA 9, the amounts due for CCTV and SACS are RM239,357.71 and RM130,088.32 respectively. Accordingly, the defendant subsequently on 20 September 2005 issued two invoices to the plaintiff. The two invoices (one for SACS and the other for CCTV) state the amount of payment certified under LOA 9. In response, the plaintiff made two part-payments to the defendant pursuant to LOA 9. The first part-payment was made on 24 January 2006 for RM57,464.31, and the second part-payment was made on 2 June 2006 for RM121, 957.54. Taking into account these part-payments, the balance amount under the LOA 9 remaining unpaid is RM190,006.18. And this is the amount demanded under the defendant's s. 218 notice.

[12] The plaintiff's main contention is that it has a cross claim against the defendant due to alleged defective/incomplete works. One of the allegations made in the plaintiff's affidavit was that the damages resulting from its cross claims is estimated to be RM190,006.18. The plaintiff, however, did not adduce any document to support this claim.

[13] Lest that I am misunderstood, I wish to say here that I am not in any way suggesting that the defendant will certainly succeed in its intended petition - if ever they were to file one. The intended petition - again, if ever presented - is yet to be heard and determined. For the present, I constantly remind myself that I have to be cautious as not to be overwhelmed by the affidavits and the written submissions of counsel of both sides, and to stray, treating the present proceeding as if I am hearing a winding up petition. True, the plaintiff is disputing the defendant's claim. However, be that as it may, on the facts and evidence, which are substantially undisputed, it cannot be fairly said that the defendant by serving a s. 218 notice with the possibility of thereafter filing a winding up petition against the plaintiff is abusing the legal process. I am not satisfied that the intended petition is bound to fail.

[14] I feel that I must add here that far from satisfying me that there is an abuse of process, it is disquieting to observe that the plaintiff in the present application has also failed to disclose to the court certain material facts. Firstly, the plaintiff has failed to disclose to the court about the two part-payments towards LO9 (as I have alluded to earlier in this judgment); secondly, since the plaintiff was alleging incomplete/defective works, it is significant that the plaintiff has failed to inform the court about a retention sum of RM347,650 that they were withholding. Hence there was failure to make a full and frank disclosure. Reverting to the authoritative work applications to wind up companies that I cited earlier, the learned author states (at p. 78):

> The applicant must make full and frank disclosure of all material facts (*Fletcher Development and Construction Ltd v. New Plymouth Hotels Holdings Ltd* [1986] 2 NZLR 302).

[15] Hence the plaintiff's present application must fail.

(Upon my dismissal of the application, the plaintiff's counsel immediately applied orally for an Erinford Injunction pending appeal to the Court of Appeal, to restraining the defendant from

presenting a winding up petition; arguing that if the Erinford Injunction is not granted, and the defendant were to proceed to present the petition, it would render the plaintiff's appeal academic or nugatory. This was opposed by the defendant's counsel. After hearing oral argument, I dismissed the plaintiff's counsel application as I am of the view that there is no merit in the application.)